

CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

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Mr. William F. Funk
Professional Staff Member of the
Subcommittee on Legislation
House Permanent Select Committee
on Intelligence
Capitol
Washington, D.C. 20515

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Dear Bill:

In the context of our 11 January 1978 discussion of the authorities and responsibilities provided by the proposed intelligence charter legislation, (S.2525 and H.R. 11245) you requested our views concerning the necessity for continued independent statutory authority to protect "unclassified" intelligence sources and methods from disclosure. In attempting to provide a response to your question, this letter does not attempt to address the entirely separate and complex issues concerning legislation to revise or supplement the espionage laws.

The appropriate question is not whether any particular information we might suggest could or should be classified, but rather whether there exists an identifiable body of information, documentary or otherwise, relating to intelligence sources and methods which is of such central importance to the effective conduct of the national foreign intelligence programs of the United States and the operations of this Agency as to warrant statutory protection independent of the vagaries of the classification system established and subject to change by Executive Order. That is, not whether such information may or should be classified according to rather arbitrary and perishable classification standards, but whether it should be recognized in statute as a category of information requiring protection in its own right.

This Agency cannot perform its functions of collecting, analyzing, correlating, producing, and disseminating national foreign intelligence without sources of intelligence information and methods of obtaining, verifying, and supplementing such information. It is inherent in the nature of these

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sources and methods that even the threat of their disclosure often will substantially and adversely affect their availability, productivity, and future value. Particularly as to human sources and methods requiring human involvement, even the lack of sufficient assurance of confidentiality may lessen or eliminate entirely an individual's willingness to cooperate with representatives of the U.S. Government in its efforts to obtain vital intelligence information.

To the extent that reasonable men may differ at any point in time concerning whether exposure of any single relationship, activity, employee, source, or contact will in and of itself result in damage to "the national security" of the United States, there can be no such assurances based upon the classification system. Recognition of such damage often requires acceptance of a multi-step argument to the effect that such exposure not only will affect the particular source or method involved, but also will deter other such relationships or allow countermeasures which will reduce or eliminate the flow of information. Also, although it is difficult to formulate a comprehensive definition of intelligence sources and methods, it is generally a simple matter to determine that a specific someone or something is in fact an intelligence source or method. Thus, statutory authority to protect such information, independent of the classification system, is a much more stable and dependable mechanism for assuring its protection. This protection should extend, as it does now, to CIA agents, contacts, sources, technical means and devices for collecting, analyzing and producing intelligence, and also to the organization, functions, names, official titles, salaries and numbers of CIA personnel. The general justification for the protection of such information has been accepted by the judiciary historically. See, e.g., Totten v. United States, 92 U.S. 105(1875); United States v. Reynolds, 345 U.S. 1 (1952). In numerous more recent instances, particularly in the context of the Freedom of Information Act, the courts have acknowledged and applied the existing authority and in every case the invocation of the Agency's statutory authority to withhold such information from disclosure has been upheld.

For example, in Richardson v. CIA (attached), the court considered whether CIA financial information related to sources and methods and concluded,

Congress, in recognition of the close correlation between the funding and actual operation of an intelligence network, has amply guarded against the unauthorized disclosure of intelligence sources and methods by exempting from public scrutiny receipts and expenditures relative to the CIA As is so clearly demonstrated by the

defendants' affidavits, disclosure of the information and records pertaining to the expenditures and transfers of public monies relative to the CIA would compromise and open up for inspection the government's intelligence network and capabilities thereby making it impossible for anyone to protect intelligence sources and methods from unauthorized disclosure.

In Bachrack v. CIA (attached), the court agreed with CIA's refusal to confirm or deny any relationship between the Agency and a deceased individual and said,

Where, as here, a request is made for information relating to a covert relationship, the CIA can respond only by refusing to confirm or deny that such relationship exists. Any other response would have the effect of divulging the very secret the CIA is directed to protect While there is a strong public interest in the public disclosure of the functioning of governmental agencies, there is also a strong public interest in the effective functioning of an intelligence service, which could be greatly impaired by irresponsible disclosure.

The court in Hayden v. CIA (attached), after examining numerous documents in camera, concluded that the sources and methods authority had been properly invoked to protect names of CIA employees, identities of CIA sources, CIA organizational data, specific office assignments of CIA employees, and the location of CIA stations. In Baker v. CIA, 425 F. Supp. 633, 636 (D.C.D.C. 1977), presently on appeal, involving CIA personnel regulations, the court concluded:

... Collectively the documents reflect management attitudes, techniques, safeguards, and conditions of employment [T]he CIA may determine that disclosure of personnel matter may by itself constitute the danger to security or intelligence sources and methods that the statute expressly seeks to prevent. No preliminary showing should be required of the CIA to prove that disclosure would in fact damage intelligence activities or compromise intelligence sources and methods. This determination already has been made by Congress, subject to implementation by the agency.

In Wood v. CIA (attached), presently on Motion for Reconsideration, the court concluded that the Agency had not established the proper classification of materials related to covert operations resulting in the foreign publication and dissemination of certain books and thus could not deny the materials requested by the plaintiff on that ground. Nonetheless, the court went on to deny the request and dismiss the action on the ground that to do otherwise would expose employment relationships and functions of CIA agents. Finally, in a

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very recent decision, Halperin v. CIA (attached), the court found, again after in camera review, that sources and methods information could be withheld despite its limited disclosure in a press briefing some years previous. See also, Weissman v. CIA, Civ. No. 76-1566 (D.C. Cir 1977); Phillippi v. CIA, 546 F. 2d 1009 (D.C. Cir 1976).

It would appear to be incongruous to refuse to provide protection for intelligence sources and methods, classified or not, when federal law protects many other types of official information for various policy reasons. For example, Section 955 of Title 7 of the U.S. Code provides that peanut statistic information shall be used only for limited purposes and that "[n]o publication shall be made by the Secretary [of Agriculture] whereby the data furnished by any person can be identified, nor shall the Secretary permit anyone other than the sworn employees of the Department of Agriculture to examine the individual reports." (June 24, 1936, ch. 745, §5, 49 Stat 1899). Citations to many additional statutes of this nature are provided in the attached appendix to this letter. The espionage statutes (18 U.S.C. 793-798) could be suggested as counterparts to these provisions with reference to intelligence sources and methods. However, many of these laws create an affirmative authority to protect information in addition to establishing a penalty for its disclosure. Furthermore, as you are aware, the espionage statutes are far from adequate, provide only an after-the-fact remedy, and require in their own right a showing of damage to the national defense which often must be premised upon a showing of proper classification. A further important distinction is that these other categories of information generally are required by law to be provided to the U.S. Government and the absence of specific authority to protect it, and even instances of disclosure, will not interfere in any significant way with its continued availability. Finally, as is illustrated by a review of the cases cited earlier, the courts are certain to interpret any retreat from the existing authority as a congressional sign that intelligence sources and methods no longer merit the careful treatment accorded them in the past.

It is for these reasons that we have urged the retention of at least the existing statutory authority to protect intelligence sources and methods in a form which will be effective and meet the requirements of 5 U.S.C. 552(b)(3) that such an authority not be discretionary or that it establish a particular criteria for withholding or refer to particular types of matters to be withheld. If the legislation continues in its present form, this responsibility should be treated separately from matters related to classification or declassification, and it would be desirable from both a bureaucratic and a legal point of view to repeat these provisions both in Title I for the Director of National Intelligence, and in Title IV for the Director of the Central Intelligence Agency. Furthermore, to emphasize the importance of this function, these provisions should not be mere grants of authority to these officials to protect intelligence sources and methods, but should take the form of an affirmative direction to provide such protection to such information.